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IN THE

Supreme Court of the United States

October Term, 1955.
No 596

CLINTON E. JENCKS,

Petitioner,

vs.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Petitioner's Reply to Government's Opposition.

The main burden of this Reply is to direct the Court's attention to the recent decision of the Court of Appeals for the Ninth Circuit in the case of *Fisher v. United States* (C. A. 9, No. 14,731, decided Feb. 15, 1956).* There a unanimous court, in an opinion by Chief Judge Denman, has rendered a decision which on three points is in conflict with the decision of the court below. These points are:

1. The right of the accused to F. B. I. records containing admissions by a government witness which may have evidentiary value for impeachment.

*The opinion is as yet unreported. A copy is set out in the Appendix.

2. The adequacy of the trial court's charge on the issue of affiliation.

3. The adequacy of the trial court's charge on the issue of membership.

The *Fisher* case was a prosecution under 18 U. S. C. 1001 for filing a false non-communist affidavit under section 9(h). (29 U. S. C. A., sec. 159(h).) The indictment alleged falsity in the denials of membership in and affiliation with the Communist Party. The problems of proof and of legal definition of membership and affiliation were the same as in this case. On the points enumerated the *Fisher* case is indistinguishable from the instant case.

The discussion which follows is directed to the foregoing three points to show the applicability of the *Fisher* opinion and to offer some observations on the Government's arguments in opposition.

1. Access to the F. B. I. Records.

In the *Fisher* case the accused sought production of the receipts prepared by the F. B. I. which one of the Government's informers had signed in return for money paid him and his wife by the F. B. I. The informer had testified that he and his wife had served the F. B. I. for 11 years, advancing their own expenses and donating their services, and that the money they had received was only reimbursement for their out-of-pocket expenses. The accused demanded production of the receipts to show, if he could, that the informer had acknowledged payment of money to them for their services. In this way he sought to destroy what the Court called the "powerful effect" of the informer's claimed devotion and patriotism. The Court held that the trial court's refusal to require the production of the receipts was "substantial error." (App. 8.)

The receipts sought in the *Fisher* case were documents signed by the witness on the stand. They were his declarations, made and executed by him. They were to be used in cross-examining him. The reports in the case at bar were made by the witness and were his declarations. Petitioner sought inspection of them so as to use them on cross-examination. The receipts in *Fisher* and the reports here stand on the same evidentiary footing.

In *Fisher* the demand was for the production of receipts extending over a period of 11 years. In the present case the request was made for reports concerning the matters and things Matusow saw or heard in the vacation ranch within the space of one month in the period of 1950, the court to examine them and release to petitioner only those contradicting the witness' direct. The description of the documents in the case at bar is at least as specific as in the *Fisher* case.

The decision in *Fisher* is in conflict with that below not simply because on a similar showing the Ninth Circuit held that the records should have been produced. It also lies in the fact that in *Fisher*, contrary to the court below (Pet'n App. 94), no condition was laid down that before production is ordered a showing be made that the requested document is inconsistent with the witness' testimony. The Court of Appeals in the case at bar bottomed its ruling that such a foundation is necessary upon this Court's decision in *Gordon v. United States*, 344 U. S. 414.*

But the conflict among the circuits is more extensive. The rule in the Second Circuit is that the prior statements of the witness will be ordered produced to the trial court, to be examined by it and turned over to the defense if

*The Government's position here is likewise based on the *Gordon* case. (Opp'n, pp. 18-19.)

impeachment value appears. That Court has specifically said that there need be no prior showing of inconsistency in order to have the document produced to the trial court.* In the Ninth Circuit production of the witness' prior declaration has been required without a showing in advance that it is inconsistent with his testimony. In so holding that court made no reference to the *Gordon* case. In addition to the holding of the court below, the Seventh Circuit, in *United States v. Lightfoot* (C. A. 7, No. 11,470, decided Jan. 12, 1956) ** holds that a prior showing of inconsistency must be made before production of the document will be ordered.

The decisions of the Second Circuit were rendered long before this Court's ruling in the *Gordon* case. The *Krulewitch* opinion was cited with approval in *Gordon*. (344 U. S. at 419, n. 11.) The decision of the Ninth Circuit in the *Fisher* case came after the *Gordon* case and the opinion gave no consideration to that ruling.*** The decisions of the court below and of the Seventh Circuit rely on the *Gordon* case. In that case this Court did not reach the problem presented here or in the *Fisher* and *Lightfoot* cases (production in the absence of a showing of contradiction between the document and the testimony) and carefully limited its ruling to the narrow facts there presented. (344 U. S. at 418.) Moreover the citation in the opinion below and in the *Lightfoot* opinion of cases dealing not with original statements of the witness on the stand for

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United States v. Krulewitch (C. A. 2), 145 F. 2d 76, 79; *United States v. Cohen* (C. A. 2), 145 F. 2d 82, 92.

**The opinion is not yet reported. Petition for Certiorari is now pending and a full copy of the Opinion is appended to that Petition. The portion dealing with the point here under discussion is reproduced in the Appendix.

***For the reasons stated in the Petition (p. 21), the *Gordon* decision has no application to the case at bar or to the *Fisher* case.

purposes of his cross-examination (as is presented here and was presented in *Gordon*) but with work-product records of a government agent,* leaves confusion as to the applicable principles. In these lights, the minimal conclusion must be that the proper application of this Court's ruling in the *Gordon* case is in substantial doubt.

This uncertainty gravely affects the sound administration of criminal justice. The use of informers in cases involving political ideas and association, and their chronic unreliability,** calls at the very least for exhaustive means for ascertaining the facts. To be decided is the extent to which cross-examination to that end is to be curtailed simply because the necessary tools for it (in this case a contemporaneous report) are in the possession of the prosecutor. Without truth no judgment rests on a secure foundation.

On the practical side, the position of the court below and of the Government here must of necessity largely frustrate the search for truth precisely where the need for probing cross-examination is the greatest.*** It is virtually impossible to develop the contradiction between the document and the witness' testimony except from the witness himself. Aside from any propensity to protect the case of his hirer, the informer may honestly say that he does not remember the contents of a report several

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*E.g., *Goldman v. United States*, 316 U. S. 129, 132.

**Whether this be in Smith Act cases (*cf. United States v. Flynn* (D. C., N. Y.), 130 Fed. Supp. 412) or in so-called loyalty cases, the damage to our institutions and our traditional freedoms, as well as to personal reputation, has been incalculable. (See, *e.g.*, *N. Y. Times*, Editorial, July 8, 1954.

***In the case at bar the informer Matusow testified to uncorroborated oral admissions, the weakest and least reliable kind of evidence. 4 Wigmore, Evidence, sec. 1056; 7 Wigmore *op. cit.*, sec. 2094.

years old, or in good faith deny a contradiction that in fact exists. Where the demand for the statements is, as here, specific, the Government is amply protected by having the trial court examine them to determine their value for impeachment purposes. Bringing the prosecution ends the Government's privilege to withhold the documents,* and the court's examination ensures that only material and relevant papers will be turned over. Insistence upon any further preconditions serves no valid governmental interest and obstructs the ascertainment of facts needful to the difficult process of ascertaining truth.

There is irony in the situation here for the contradiction between Matusow's direct, at the trial, and his F. B. I. reports were developed at the new trial hearing where he recanted his trial testimony. The Government's version of the hearing testimony (Opp'n, p. 22) we cannot accept as complete. The full facts are set out in our Petition. (Pp. 13-14.) Surely in such a situation, where the contradiction has been shown as fully as any preliminary foundation could spell it out, the attempt to justify denial of access to the reports is mere insistence on formality. The judgment against petitioner is not yet beyond recourse. Surely the appearance, and probably the reality, of justice would be destroyed in this case if petitioner were to go to jail without ever having had resort to these most telling lodestars of truth.

United States v. Andolschek (C. A. 2), 142 F. 2d 503, 506; *United States v. Krulewitch, supra; United States v. Beekman* (C. A. 2), 155 F. 2d 580, 584; *United States v. Grayson* (C. A. 2), 166 F. 2d 863, 870. With exceptions not here important the Government as a party to civil litigation is subject to the discovery rules. Anno. 95 L. Ed. 425; 445-448.

2. The Adequacy of the Trial Court's Charge on the Issue of Affiliation.

In the *Fisher* case the trial court's instruction on the issue of affiliation was virtually identical with that given by the trial court in the case at bar. In *Fisher* the trial court told the jury that the word "affiliated" as used in the indictment and the statute had "no unusual or different meaning apart from [its] normal or common usage." It then read a portion of Webster's definition of "affiliate" as follows:

> "To connect or associate oneself with; to adopt, hence usually to bring or receive into close connection; to ally."*

The Court of Appeals in *Fisher* held that this definition was erroneous in that it did not contain the elements of mutual dependability and working alliance to bring a proscribed program to fruition, which this Court laid down in *Bridges v. Wixon*, 326 U. S. 135. (App. pp. 15-16.)

The court below on the other hand approved the dictionary definition of "affiliation" out of hand and without discussion of the application of the rule of *Bridges v. Wixon*. This it did on the authority of *Hupman v. United States* (C. A. 6), 219 F. 2d 243, cert. den. 349 U. S. 953. An examination of the *Hupman* opinion (219 F. 2d at 249) discloses that the Court there did not refer to the principles laid down in *Bridges v. Wixon*.

There can be no doubt that the holding of the Ninth Circuit in the *Fisher* case is in direct conflict with the

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*The trial court in the case at bar used the same definition but included additional language, viz., "to unite or attach such as a member or branch." We do not here discuss the problems thus presented.

holding of the Fifth Circuit in the instant case as to the standard of affiliation to be employed in criminal prosecutions based upon section 9(h). It would appear that the Ninth Circuit is the first Court of Appeals, confronted with the problem in a section 9(h) case, to indicate by its opinion that it has given any attention to the ruling of *Bridges v. Wixon.*

The Government contends (Opp'n, pp. 27-29) that the *Bridges* case does not apply. The Government urges that the statute in the *Bridges* case showed "Congressional concern with the unlawful purposes" of the proscribed organization, whereas here there is no such concern, the question merely being one of affiliation *vel non*. But this overlooks the legislative history of section 9(h) as noticed by this Court in *American Communications Association v. Douds,* 339 U. S. 382, 388, 392. There this Court, in order to save the constitutionality of the section, found that Congress was "concerned" with the asserted policy of the Communist Party to call strikes for political purposes. The concept "affiliation" is by its nature so broad that, unless narrowly drawn as in the *Bridges* case, its contours encompass activities entitled to First Amendment protection. Moreover, unless the concept is narrowly construed, one called upon to take the prescribed oath is confronted with a statute that suffers from Fifth Amendment vagueness. The statute would not give adequate warning of what it is he is abjuring so that he is not provided with an ascertainable standard of possible guilt.

In both the *Bridges* case and the *Douds* case this Court has sought to resolve those problems by reference to a definition of affiliation predicated in part upon association for a proscribed purpose. It found the basis for so doing in express legislative intent. Congress could not have

willed a broader meaning, nor this Court have approved it, without far-reaching inroads upon the protections extended by the First Amendment and the due process clause.

3. The Adequacy of the Trial Court's Charge on the Issue of Membership.

In the *Fisher* case the Court defined membership in dictionary terms, reminding the jury that the word "member" in the indictment and statute had "no unusual or different meaning apart from [its] normal or common usage." The Court gave Webster's definition of "member" as follows:

> "One of the persons composing a society, community or party; an individual who belongs to an association."

The trial court in that case refused an instruction setting out "the formal requirements for membership in the Communist Party, applying and being accepted, accepting the principles of the Party, acting for the Party and paying dues and attending Party meetings." The Court of Appeals in *Fisher* held that the instruction as given was erroneous because it failed to break down membership "into its component elements," that is, into the "formal requirements for membership as stated in its Constitution." (App. pp. 13-15.)

The decision of the court below is squarely in conflict with that in the *Fisher* case. As pointed out in our Petition (pp. 26-29) the trial court in this case virtually told the jury that it could find whether defendant was a member from any evidence which it thought bore on the question, thus leaving the matter more at large than under the dictionary definition in *Fisher*. The trial court also

refused petitioner's proposed instruction requiring a finding that the accused had fulfilled the formal requirements of membership prescribed by the Party. [R. 1120-1121]*

The court below approved the instruction given as well as the refusal of the instruction requested on the authority of the *Hupman* case, *supra*. It will be recalled that neither the court below nor the court in the *Hupman* case set out any legal reasoning or authorities by which their conclusions were reached. (219 F. 2d at 249.)

It is therefore apparent that the conflict between the court below and the Ninth Circuit is square and irreconcilable on the necessity of instructing the jury that to find membership it must find that the accused has complied with the "formal requirements for membership" laid down by the Party. As Chief Judge Denman's opinion points out, such an instruction is essential to satisfy the requirement laid down by this Court in the *Douds* case, *supra*, that "punishment is restricted to acts done with knowledge that they contravene the statute" and "no honest untainted interpretation . . . is punishable." (339 U. S. at 413.) Nothing less will satisfy the due process requirement of an ascertainable standard of guilt. This consideration was apparently ignored by the court below.

The Government's Opposition (p. 24) dismisses the need for adequate instruction on the legal definition and formal requirements of membership on the ground that this is a "familiar concept and obviously used in its fa-

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*The Government made no effort to prove what the formal requirements for membership were or that they had been met in whole or in part. The only testimony on the subject is that of Eckert, who said that the Party's Constitution "contains provisions dealing with conditions for obtaining and retaining membership in the Communist Party." [R. 1002.]

miliar sense." But the Court in the *Fisher* case rejected this contention, saying that the jury "should have been reminded of the components of the term membership." Obviously this is so if the jury's verdict is to reflect a finding of fact governed by applicable law.

The Government also would justify a finding of membership from evidence which merely shows conduct consistent with membership. (Opp'n, p. 26.) As we noted in the Petition (pp. 27-29), the jury was not instructed that it could base its finding only upon conduct consistent with membership, but rather upon that or anything else in the evidence which it considered bore on the question. The Government's position is predicated on the assumption that the evidence shows a policy, applied to and followed by petitioner, to conceal membership. It points to evidence in the *Hupman* case (219 F. 2d at 248) to the effect that Hupman received and accepted instructions from Party leaders to conceal his membership. There is no such evidence in this case, and there is no evidence that petitioner was subjected to or subscribed to any such policy. Significantly in the *Fisher* case there was evidence of general Party policy for union leaders to drop overt connections with the Party. But the Court there did not conclude that such evidence dispensed with the traditional responsibility of the Court to instruct the jury on the applicable law by giving a charge requiring a finding that the accused had complied with the formal requirements of membership.

Conclusion.

For the reasons stated herein, the importance of this case to the administration of justice in the criminal courts has been increased by the developments since the Petition was filed. The importance of a clear rule concerning the availability of informers' prior declarations for purposes of testing the accuracy of their testimony has been etched in urgent terms by the decisions of the Ninth Circuit in *Fisher* and the Seventh Circuit in *Lightfoot*. The need for clear instructions on applicable law dealing with the subjects of membership and affiliation, in order to avoid constitutional infirmities under the First and Fifth Amendments, have been sharply posed by the decision in the *Fisher* case as compared with the decision here. For all these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX.

Opinion of the Court of Appeals for the Ninth Circuit in Fisher v. United States.

United States Court of Appeals for the Ninth Circuit.

Avalo Allison Fisher, Appellant, vs. United States of America, Appellee. No. 14,731, Feb. 15, 1956.

Appeal From the United States District Court For the Western District of Washington, Northern Division.

Before: DENMAN, Chief Judge, BONE, Circuit Judge and BYRNE, District Judge.

DENMAN, Chief Judge:

Fisher appeals from a conviction on four counts of violating 18 U. S. C. §1001 by filing non-communist affidavits in the years 1951 and 1952 to comply with 29 U. S. C. §159(h), the Taft-Hartley Act, which contained false statements about his memberships and affiliations. He contends that the indictment was defective in three respects, that the trial judge erred in excluding and admitting evidence, that the jury was improperly instructed, and that the United States failed to prove a case against him.

The relevant statutes provide as follows:

"§1001. Statements or entries generally.

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent state-

ment or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"§159(h).

No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board *an affidavit* executed contemporaneously or within the preceding twelve-month period *by each officer of such labor organization* and the officers of any national or international labor organization of which it is an affiliate or constituent unit *that he is not a member of the Communist Party or affiliated with such party,* and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provision of section 35 A of the Criminal Code [now 18 U. S. C. §1001] shall be applicable in respect to such affidavits." [Emphasis added.]

I. THE INDICTMENT.

Appellant contends that the indictment failed to set out the essentials of the offense charged, that it failed to set forth with sufficient precision and clarity the manner in which the offenses were committed, and that it improperly charged six crimes where only three acts had taken place.

(a) *The absence of an allegation of materiality.* Appellant contends that the indictment failed to charge one of the essential elements of the crime in that it failed to charge that the false statements alleged to have been in

the affidavits were "material." In Rolland v. United States, 200 F. 2d 678 (Cir. 5, 1953) a conviction under 18 U. S. C. §1001 was reversed for such a failure. Appellant concedes that the indictment did not have to use the word "material" but could have charged facts which would have indicated that the statements were material. However, appellant contends that the facts which would have indicated that the statements were material, and which were not alleged, were (1) that the statement was filed to secure compliance with Section 159(h), (2) that appellant was a union leader required to file, and (3) that he filed in order that his union might use the facilities of the National Labor Relations Board.

The Government contends that "materiality" is not an essential element of the crime of filing a false written document but that the term applies only to the first section of 18 U. S. C. §1001 dealing with making a concealment of a material fact. United States v. Lange, 128 F. Supp. 797 (S. D. N. Y. 1955); United States v. Varano, 113 F. Supp. 867 (M. D. Pa. 1953). The language of Section 1001 seems to justify such a construction. However, even if an opposite construction is taken, appellant has not alleged that this defect in the indictment was prejudicial nor has he made any showing to this effect. Appellant knew the materiality of his statement. The statements ultimately proved were certainly material. If this is error, it is harmless error under F. R. Crim. P. 52(a).

(b) *The charge of "affiliation."*

Appellant contends that the charge of "affiliation" in the Second, Fourth and Sixth Counts of the indictment, standing alone, is so vague as to give no fair or adequate notice of the offense charged. He contends that the Su-

preme Court in American Communications Association v. Douds, 339 U. S. 382, 412-413 (1950) in construing Section 159(h)'s term "affiliated" to avoid unconstitutional vagueness in effect required: (1) the charge of affiliation to be defined so the defendant will be informed as to what conduct of his the Government considers affiliation, and (2) the charge that the defendant knew that such specified conduct constituted "affiliation." The indictment in this case did neither.

What the Supreme Court said in the Douds case concerning the term affiliated was as follows:

"The argument as to vagueness stresses the breadth of such terms as 'affiliated,' 'supports' and 'illegal or unconstitutional methods.' There is little doubt that imagination can conjure up hypothetical cases in which the meaning of these terms will be in nice question. The applicable standard, however, is not one of wholly consistent academic definition of abstract terms. It is, rather, the practical criterion of fair notice to those to whom the statute is directed. The particular context is all important.

"The only criminal punishment specified is the application of §35(a) of the Criminal Code, 18 U. S. C. §1001, which covers only those false statements made "knowingly and willfully." The question in any criminal prosecution involving a non-Communist affidavit must therefore be whether the affiant acted in good faith or knowingly lied concerning his affiliations, beliefs, support of organizations, etc. And since the constitutional vice in a vague or indefinite statute is the injustice to the accused in placing him on trial for an offense, the nature of which he is given no fair warning, the fact that punishment is restricted to acts done with knowledge that they contra-

vene the statute makes this objection untenable . . ." There is no support for appellant's contention as to the proper contents of the indictment concerning the charge of affiliation in the language quoted, and there is no other language dealing with the question of affiliation in the Douds opinion.

Undoubtedly affiliate is not a precise term with neat boundaries. However, there is no requirement that the Government go further in the indictment.

(c) *The splitting of two acts into six crimes.*

Appellant contends that the indictment was defective in that it took his three acts of filing affidavits in 1951, 1952 and 1953, and made six crimes out of them. The indictment contained a count concerning appellant's statement that he was not a member of the Communist Party and his statement that he was not affiliated with that party for each of the three years. Section 1001 makes criminal the making of "any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry . . ." The crime denounced by section 1001 of title 18, read in the light of section 9(h) of the National Labor Relations Act, is the act of filing a false noncommunist affidavit with the National Labor Relations Board. United States v. Valenti, 207 F. 2d 242, 244 (Cir. 3, 1953).

Appellant contends that the crime here was the filing of an affidavit with any false matter contained in it, and that each false statement contained in a particular affidavit did not create a new and different crime. He points out that he was charged with both membership and affiliation, relationships vis a vis the Communist Party incompatible with one another. He contends that this indicates that

Congress did not intend more than one crime to attach to the filing of one affidavit no matter how many false statements are contained in it.

In a very recent decision, Bell v. United States, 349 U. S. 81 (1955), the Supreme Court stated as follows:

"When Congress has the will, it has no difficulty in expressing it—when it has the will, that is, of defining what it desires to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit. When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity."

Doubt should be resolved against turning a single transaction into a multiple offense.

However, appellant was only sentenced to five years on each count to run concurrently. The attack on splitting the cause of action would leave at least one good count for each of the three years. This alone does not justify reversal. See Hirabayshi v. United States, 320 U. S. 81, 85, 105 (1943); Pinkerton v. United States, 328 U. S. 640, 641-642 n. 1 (1946).

II. Exclusion and Admission of Evidence.

Appellant contends that the trial court erred in excluding certain items of evidence offered by him and in admitting certain items offered by the United States.

(a) *Admission of evidence.*

Appellant argues that the trial court improperly admitted testimony of one Harper, and FBI informant who had infiltrated the Communist Party, that he had seen appellant at a closed Communist Party meeting in 1949. Ap-

pellant contends that actions in 1949 are not probative on the issue of whether he was a member or affiliated with the Communist Party in 1951, 1952 and 1953. The Government contends that such evidence in connection with other testimony was probative to circumstantially prove appellant's guilt by showing (1) appellant was a Communist in 1949, (2) it was the policy of the Communist Party thereafter to have labor leaders withdraw and to impose security measures, and (3) appellant acted as a Communist during the critical period of 1951 to 1953. Such a theory of prosecution is permissible. See Hapt v. United States, 330 U. S. 631, 642 (1947); Hupman v. United States, 219 F. 2d 243, 248 (Cir. 6, 1955); Jencks v. United States, 226 F. 2d 540 (Cir. 5, 1955).

Appellant further urges that the trial court erred in allowing the following: Harper testified that he did not recall seeing appellant at a Communist Party meeting after 1949 and then asked if he could explain. The court allowed him to do so. Harper then stated "It is very possible that I have seen Mr. Fisher [the appellant] at other meetings . . ." But that he could not recall such meetings clearly. Appellant labels this as a guess rather than an opinion or a belief.

The United States replies to this by stating that the matter was one for the trial court's discretion and that such discretion was not abused here. See, *e.g.*, United States v. Graham, 102 F. 2d 436, 441 (Cir. 2, 1939); United States v. Stoehr, 100 F. Supp. 143, 154 (M. D. Pa. 1951), affd., 196 F. 2d 276 (Cir. 3, 1952), cert. denied, 344 U. S. 826 (1953). The discretion was not abused. The opinion of Harper properly went to the weight of the testimony, not its admissibility.

(b) *Exclusion of Evidence.*

Appellant sought the production of the records of the Federal Bureau of Investigation to show the receipts prepared by the F. B. I. which were signed by informer Harley Mores for himself and his wife Mazie Mores for moneys paid them by the F. B. I. from 1942 to 1953 amounting to $10,530, $5,780 being paid from 1950 to May 21, 1953.

Mores claimed this large sum was for his and his wife's *expenses* only. As he describes it, it was for money that he was "actually out." That is to say the informer claimed he and his informer wife were so devoted to the interests of justice that he advanced out of his own pocket all these expenses and that they devoted their time and energy for over eleven years in aiding the F. B. I. in its seeking for evidence for prosecutions, without any payment at all for the time they spent and energy they exercised for the benefit of the F. B. I.

It is obvious that if Mores and his wife were such extraordinarily devoted public servants their evidence would have a powerful effect on the jury. Without their evidence Fisher would not have been convicted. In this situation the production of the individual receipts was demanded.

Since if Mores' testimony were true they would have proved the claimed patriotic character of the long service of Mr. and Mrs. Mores, one would expect the Government to have been glad to produce the receipts. Instead it resisted the motion and the court sustained its opposition permitting only the admission of the annual totals. Here the court committed substantial error.

Appellant further argues that the trial court erred in not allowing him to call the United States Attorney trying the case as a witness to impeach the witness Harper. Appellant relies on a statement made by the United States Attorney in an argument on admission of evidence before the trial judge wherein he said that Harley Mores was the only witness "showing Mr. Fisher's implication in this case." Appellant hoped to impeach Harper by the testimony of the United States Attorney that Harper had told him before trial that he could not implicate appellant.

Appellant's quotation from the United States Attorney is taken out of context. He stated that *possibly* Mores was the only one who could implicate appellant, and so he wanted to be allowed to show Communist Party security measures to explain why no one else could do so. Harper only testified that he had seen appellant at a meeting in 1949 and that it was very possible that he had seen him later but that he was not sure. This was a proper exercise of discretion.

Finally appellant urges that the trial court erred in not allowing him to cross examine the witness Harper on his prior false identifications of Communists in Security Board Hearings. The Government contends that all appellant wanted to do was show prior inconsistent statements, and they rely on the rule that a witness cannot be impeached by an inconsistent statement on a collateral matter. Shanahan v. Southern Pacific Co., 188 F. 2d 564 (Cir. 9., 1951).

However, appellant's theory was that Harper had been presented to the jury as an "expert" on Communism, Communist activity and on identification of Communists. He wanted to challenge Harper's expert standing and

show bias in that Harper was paid to produce his testimony. Harper's testimony placing appellant at a closed meeting of the Communist Party in 1949 was a critical part of the Government's case. Great latitude in cross examination should be allowed. We hold the court erred in refusing it. See United States v. Augustine, 189 F. 2d 587, 590-591 (Cir. 3, 1951).

III. The Jury Instructions.

(a) *Application of the perjury corroboration rule.*

Appellant contends that the trial judge erred in failing to give an instruction that the testimony of one witness was insufficient to prove the falsity of the affidavits and that two witnesses or one witness plus independent corroboration were required to convict. The trial court instructed that the jury could find appellant guilty from circumstantial evidence. In short, appellant contends that the perjury corroboration rule should apply to prosecutions under 18 U. S. C. §1001. See Weiler v. United States, 323 U. S. 606 (1942); United States v. Arena, 226 F. 2d 227 (Cir. 9 1955).

There are no cases directly in point. This court refused to apply the perjury corroboration rule to a prosecution under Section 1001 in Todorow v. United States, 173 F. 2d 439 (Cir. 9), cert. denied, 337 U. S. 925 (1949). However that was a case where the defendant was charged with causing another to make a false statement under 18 U. S. C. §2. The falsity of the statement was not in issue. In Hupman v. United States, 219 F. 2d 243 (Cir. 6. 1955), the court allowed a conviction to stand where an instruction similar to the one given in this case was given. However, the Sixth Circuit failed to discuss the question of whether the perjury corroboration rule should be applied to a Section 1001 case.

Appellant relies on Hammer v. United States, 271 U. S. 620 (1926) where the Supreme Court applied the corroboration rule to a prosecution for subornation of perjury.[1] The court stated at page 629:

"The rule that the uncorroborated testimony of one witness is not enough to establish falsity applies in subornation as well as in perjury cases . . . Falsity is as essential in one as in the other. It is the *corpus delicti* in both."

Appellant argues that here and in perjury cases "falsity is as essential in one as in the other." He further contends that the reason behind the rule stated in the Weiler case by the Supreme Court is as applicable to Section 1001 prosecutions as to perjury cases. The corroboration rule is a protection against unfounded prosecutions, and "implicit in its evolution and continued vitality has been the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less stringent rule were adopted." Weiler v. United States, supra at 609.

The United States quotes an earlier paragraph in the Weiler opinion which indicates that the policies are not the same in regard to corroboration.

"Lawsuits frequently engender in defeated litigants sharp resentments and hostilities against adverse witnesses, and it is argued, not without persuasiveness, that rules of law must be so fashioned as to protect honest witnesses from hasty and spiteful retaliation in the form of unfound perjury prosecutions." [Emphasis added.]

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[1]This circuit has also so held, Catrino v. United States, 176 F. 2d 884, 888 (Cir. 9, 1949).

The corroboration rule has been greatly criticized on the ground that it is inconsistent to rule that evidence sufficient to warrant the death penalty for murder is insufficient to convict a man of perjury. See, *e.g.*, 7 Wigmore on Evidence §§2040-2041 (3d ed. 1940). This circuit has narrowed the rule in perjury cases to require only evidence of corroboration which convinces the jury that the main witness is telling the truth.

The question is a close one, but the reasons behind the perjury rule do not seem applicable. The trial court did not err.

(b) *The precautionary instruction on secret informers.*

Appellant argues that the trial court erred in not giving an adequate instruction warning the jury about the testimony of paid informers. The trial court gave the following instruction:

"The evidence shows that certain of plaintiff's witnesses were in times past engaged by the government to join the Communist Party and make reports to the Federal Bureau of Investigation of such facts as they learned during such association; also that they were paid considerable sums of money while so engaged. *In weighing the testimony of such witnesses in this case you should scrutinize their testimony with care and caution* and after so considering their testimony give it just such weight as you believe it to be entitled to in view of all the circumstances of the case as disclosed by the evidence. If you find they have testified truthfully such testimony is as good as the truth testified to from any other source." [Emphasis added.]

We think the instruction adequate on the testimony of Mores that the moneys paid him were for expenses only. However, the instruction does not cure the denial of

the production of the receipts which well may have shown that Mr. and Mrs. Mores were paid money *for their long service* in procuring evidence. In that event the instruction should have stated that they had been "paid considerable sums of money while so engaged" but that they also were paid for their services for spying on Fisher. As stated in 3 Wigmore on Evidence, §969:

"One who as a *spy* obtains information of a crime is not necessarily open to discredit thereby; but one who for that purpose . . . has worked for hire in his investigations . . . may under the circumstances be open to the suspicion of bias or interest." See also, Harris v. United States, 169 F. 2d 887 (D. C. Cir., 1948); Steem-Electric Corporation v. Herzfeld-Phillipson Co., 118 F. 2d 122 (Cir. 7, 1940); Hostetter Co. v. Bower, 74 Fed. 235 (C. C. N. Y., 1896).

(c) *The definition of membership and affiliation.*

The trial court gave the following instruction defining "membership" and "affiliation" to the jury as those terms are used in 29 U. S. C. §159(h):

"As used in the indictment and statute the words 'member' and 'affiliated' when applied to the Communist Party have no unusual or different meaning apart from their normal or common usage.

"Webster's New International Dictionary defines 'member' as follows:

" 'One of the persons composing a society, community, or party; an individual who belongs to an association.'

" 'Affiliate' is defined as follows:

" 'To connect or associate one's self with; to adopt, hence usually to bring or receive into close connection; to ally.' "

The appellant contends that both parts of the instruction are erroneous. His proposed instruction stated the formal requirements for *membership* in the Communist Party, applying and being accepted, accepting the principles of the Party, acting for the Party and paying dues and attending Party meetings.

Membership is composed of a desire on the part of the person in question to belong to an organization and acceptance by the organization. Moreover, certain actions are usually required such as paying dues, attending meetings and doing some of the work of the group. These were the factors mentioned in the Supreme Court's opinion in Galvan v. Press, 347 U. S. 522, 528-529 (1954) where the court considered whether the evidence justified the conclusion that a certain person was a member of the Communist Party. Congress in the Communist Control Act of 1954 indicates twelve types of evidence which a jury may consider to determine the question of membership. 50 U. S. C. §844. Analyzed carefully they break down into acts of the individual indicating a desire to belong, acts of acceptance by the organization, and various contributions of funds or services to the organization.[2]

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[2]It should be recognized that both the opinion of the United States Supreme Court in Galvan v. Press, 347 U. S. 522 (1954), and the Communist Control Act of 1954, 50 U. S. C. A. §844 (1955 Supp.), were handed down and enacted several years after the passage of Section 9(h) of the Labor Management Relations Act of 1947, 29 U. S. C. A. §159(h) (1955 Supp.), and neither deals directly with the question of the proper instruction to a jury in a prosecution for filing a false non-Communist affidavit. However, they are indications of what the Supreme Court and the Congress believe to be the components of the often used phrase "member of the Communist Party."

The dictionary definition read to the jury by the trial court defined "membership" in terms of its synonyms rather than breaking it down into its component elements. The issue thus is whether this is error. The Government contends that "membership in an organization is one of the most common and frequently exercised privileges of an American citizen, and it is doubtful if there is any juror who does not understand the acts which constitute membership in an organization." Under 29 U. S. C. §159(h) and 18 U. S. C. §1001, "punishment is restricted to acts done with knowledge that they contravene the statute" and "'no honest, untainted interpretation . . . is punishable" American Communications Association v. Douds, 339 U. S. 382, 413, (1950). Appellant contends that he might honestly state he was not a member if he had failed to comply with any of the Party's formal requirements for membership as stated in its Constitution. The Government does not answer this contention in their brief. The jury should have been reminded of the components of the term membership rather than be supplied with synonyms. The instruction was erroneous.

Appellant also contends that the instruction concerning affiliation was too vague. The trial court defined it as follows: "To connect or associate one's self with; to adopt, hence usually to bring or receive into close connection; to ally." The Supreme Court considered the meaning of the phrase "affiliated with the Communist Party" at some length in Bridges v. Wixon, 326 U. S. 135 (1945). The Court quoted with approval the following from United States v. Reimer, 79 F. 2d 315, 317 (Cir. 2, 1935):

"Affiliation includes an element of dependability upon which the organization can rely which, though not equiva-

lent to membership duty, does rest upon a course of conduct that could not be abruptly ended without giving at least reasonable cause for the charge of a breach of good faith."

The Court itself stated:

"[Affiliation] . . . imports . . . . less than membership but more than sympathy . . .

"Whether intermittent or repeated, the act or acts tending to prove 'affiliation' must be of that quality which indicates an adherence to or a furtherance of the purposes or objectives of the proscribed organization as distinguished from mere cooperation with it in lawful activities. The act or acts must evidence a working alliance to bring the program to fruition."

The question is whether the definition given by the trial judge was sufficient to get across to the jury the idea of a continuing reciprocal relationship involving duties and responsibilities. The proper test to apply is whether one could be convicted under the instruction which was given who was only in sympathy with the aims of the Communist Party, and who occasionally would, say distribute literature for it but without any obligation to do so or to continue to do so. He would have connected or associated himself with the Communist Party. He would be its ally. One who was in sympathy with the aims of the Communist Party might be an undesirable person to have as a labor leader since he might agree to call a political strike to further that Party's revolutionary ends. However, under the test of affiliation laid down in Bridges v. Wixon he could honestly answer that he was not affiliated with the Communist Party. If the test of affiliation given in that case is still applicable, and unless the Government can distinguish the case, this instruction is erroneous.

IV. The Evidence.

Appellant contends that his conviction was not justified by the evidence. The evidence taken most strongly for the Government, Glasser v. United States, 315 U. S. 60, 80, is as follows: Appellant attended an important meeting of Communist Party leaders in 1949 which was closed to non-members. Both the witnesses Mores and Harper testified to this. Appellant collected Mores' party dues in September of 1950 and asked him what the Party policy on Section 159(h) affidavits was. He was not seen in Party circles from 1950 to 1952. However, during this time the Communist Party policy was that labor leaders subject to such affidavits could destroy Party cards and neither attend meetings nor pay dues. Local groups were to destroy lists with the names of union leaders on them. Only two or three people knew which union leaders were Communists. Mores testified that in 1952 he met appellant at a meeting where it was announced that appellant was the new organizer for a certain district and in charge of collecting dues. At a later meeting appellant gave Mores literature and a reading list of Communist documents. Mores saw appellant at two later meetings wherein appellant played a significant role as a leader.

Thus the Government's case was that appellant was a member of the Communist Party or affiliated therewith both before and after 1951 and 1952, the years in which he executed and filed non-Communist affidavits. (Appellant was acquitted on the counts concerning 1953. During those two years it was Communist Party policy for union leaders to drop their overt connections with the Party. The case circumstantially proves membership or at least affiliation at the time the affidavits were executed since

the jury was free to draw the obvious inference that appellant continued his Party connections.

Appellant points to discrepancies in the testimony of Mores. Mores on cross examination was not a good witness, often answering "I don't know" and evading questions. However, this is a question of credibility for the jury. Mores' knowledge that the meetings were closed to all but Communists was attacked as hearsay but appellant's brief does not spell out why or how his knowledge was hearsay. The record does not supply this gap. Mores and Harper placed the 1940 meeting a year apart, one stating it was in December of 1949, the other in January of 1949. However, the jury was free to accept the obvious explanation of the common mistake about the year in which something occurred when the transaction took place in either December or the following January. We think the evidence sustains the verdict.

Because of the errors in excluding evidence and in the instructions the judgment is reversed.

(Endorsed:) Opinion. Filed Feb. 15, 1956. Paul P. O'Brien, Clerk.

Excerpts From the Decision of the Court of Appeals for the Seventh Circuit in United States v. Lightfoot:

In the United States Court of Appeals for the Seventh Circuit.

No. 11470. October Term, 1955—January Session, 1956.

The United States of America, Plaintiff-Appellee, v. Claude Mack Lightfoot, Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 12, 1956.

Before DUFFY, *Chief Judge*, and LINDLEY and SWAIM, *Circuit Judges*.

DUFFY, *Chief Judge*. Defendant was convicted after a jury trial on a one count indictment which charged violation of the "membership" clause of Section 2 of the Smith Act. 54 Stat. 671, 18 U. S. C. §2385.[1] . . .

Defendant claims the trial court erred in refusing to order the production of a report made to the FBI by the witness Brzek who was a member of the Communist Party from 1943 to 1947. In the latter year Brzek attended classes taught by defendant Lightfoot at a Communist School conducted in Ivanhoe, Wisconsin. It was at one of these classes Brzek testified that defendant stated: "If we have to shed blood, we will." On cross-examination Brzek testified he had made a report with reference to said classes to the Milwaukee office of the FBI. The report thus made was not in the courtroom, nor did the witness use a copy thereof to refresh his memory. The motion to produce was made after the Government had

closed its case. Defendant offered no oral testimony. On his claim of error, defendant relies principally upon Gordon *et al.* v. United States, 344 U. S. 414.

In Gordon the Court said, pages 418-19: "By proper cross-examination, defense counsel laid a foundation for his demand by showing that the documents were in existence, were in possession of the Government, were made by the Government's witness under examination, were contradictory of his present testimony, and that the contradiction was as to relevant, important and material matters which directly bore on the main issue being tried: * * *."

In the case at bar nothing was developed on cross-examination to the effect that the report to the FBI conflicted with the direct testimony of Brzek. Thus an essential element of the rule stated in Gordon was not here present. No proper foundation was laid for the production of the report, and the trial court was correct in denying the motion to produce. The United States of America v. Echeles, 7 Cir., 222 F. 2d 144, 152-153; Starr v. Commissioner of Internal Revenue, 7 Cir., 226 F. 2d 721, 724; Jencks v. United States of America, 5 Cir., 226 F. 2d 540, 553; Jencks v. United States of America, 5 Cir., 226 F. 2d 553, 560-561.

Furthermore, we think that the District Court, under the rule stated in Goldman v. United States, 316 U. S. 129, 132, properly denied the defendant's motions. The Court, in that case, used this language:

"We think it is the better rule that where a witness does not use his notes or memoranda in court, a party has no absolute right to have them produced and to inspect them. Where, as here, they are not only the witness' notes but

are also a part of the Government's files, a large discretion must be allowed the trial judge. We are unwilling to hold that the discretion was abused in this case."

To the same effect: Iva Ikuko Toguri D'Aquino v. United States, 9 Cir., 192 F. 2d 338, 375; Imperatore v. United States, 2 Cir., 193 F. 2d 409, 410; Neal v. United States, 5 Cir., 203 F. 2d 111, 118; United States v. Mesarosh, *et al.*, D. C. W. D. Pa., 116 F. Supp. 345, 349, 350.